Chua Teck v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors

HIGH COURT (JOHORE BAHRU) – CRIMINAL APPLICATION NO 54-1-1988
LC VOHRAH J
15 MARCH 1989

Administrative Law – Detention order made – Extension of original detention – Subjective satisfaction of the Minister – Reliance on report which was ultra vires – Whether reliance was prejudicial – Dangerous Drugs (Special Preventive Measures) Act 1985, ss 3(3), 5(1), (4), 6(1), (5)(a), 11(4) & 11A(1)(a)(aa)

Preventive Detention – Detention order made – Extension of original detention – Subjective satisfaction of the Minister – Reliance on report which was ultra vires – Whether reliance was prejudicial – Dangerous Drugs (Special Preventive Measures) Act 1985, ss 3(3), 5(1), (4), 6(1), (5)(a), 11(4) & 11A(1)(a)(aa)

The applicant was arrested under the Dangerous Drugs (Special Preventive Measures) Act ('the Act') and a detention order was made on 2 April 1986 for two years. On the day when the applicant was to be released, a second detention order was made, extending the first detention for a further two years. The applicant challenged the legality of the detention on two grounds: firstly, that the various allegations of fact were stale and remote in point of time in relation to the date of the making of the original detention order as the alleged activities took place between the end of 1981 to September 1983 whilst that detention order was only made on 2 April 1986, and secondly, that in making the extension order the Minister applied his mind to prejudicial material not only in the case file but also in the report of the advisory board which was contrary to s 11(4) of the Act.

Held, allowing the application:

(1) The question of staleness or remoteness goes to the question of sufficiency or relevancy of the facts, an enquiry which the court cannot embark on as it is based on the subjective satisfaction of the Minister.

(2) It was clear that the extension of the original detention was on the same grounds as the first detention order. After the coming into operation of the Amendment Act 629 of 1985, the advisory board was only allowed upon review of each case, either to recommend the cessation or to recommend the continuance of the detention order and was not entitled to recommend the extension of the order which it could do previously. Although the Act did not provide the basis upon which the Minister was required to act before deciding to extend the detention order but as he purported to act on reports and information from the applicant's file and the report of the advisory board and as the recommendation was ultra vires the Act, the Minister, in taking into account the report, was in fact acting in a manner prejudicial to the applicant as the advisory board's report must by its very nature have been very persuasive in affecting the decision of the Minister.

(3) It is trite law, that in the examination of cases relating to persons detained without trial, the court has no discretion but to grant the subject the writ of habeas corpus where he had been unlawfully detained.

(4) The court is precluded from adjudicating on the sufficiency of the satisfaction of the Minister but it can examine whether the detention falls within the scope of the law under consideration. When the Minister considered the report of the advisory board which contained a specific recommendation for the detention of the applicant, he had in fact taken into account extraneous material which the law did not contemplate he should consider and therefore purported to exercise powers beyond the ambit of the law. As there was no strict compliance with the provisions of the law, the applicant was entitled to be granted his application.

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Criminal Appeal No 05-29-1989.]

Cases referred to

1 *Ee Kim Huan* v *Inspector-General of Police & Ors* Seremban Criminal Application No 44/(54)-59-88 (unreptd) (refd)
2 *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 102 (folld)

Teh Poh Teck for the applicant.
Mohd Raus Sharif (Senior Federal Counsel) for the respondent.

Cur Adv Vult

LC Vohrah J: This was an application for a writ of habeas corpus ad subjuciendum and was supported by an affidavit affirmed by the wife of the applicant. The undisputed facts relating to this application were briefly as follows. The applicant was arrested under s 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 on 6 February 1986 and a detention order under s 6(1) of the Act ('the first detention order') was made by the Minister of Home Affairs on 2 April 1986 to take effect for a period of two years from 6 April 1986 on the basis of his satisfaction after considering the complete report of investigation submitted under sub-s (3) of s 3 and the report of the inquiry officer submitted under sub-s (4) of s 5. On the day the applicant was to be released, ie 5 April 1988, he was served with a second detention order dated 4 April 1988 made by the Minister under s 11A(1)(a)(aa) extending the first detention for a further period of two years commencing from 5 April 1988. He did so in the second instance on the basis of his satisfaction from 'the reports and information relating to the conduct and activities of the applicant.'

The applicant challenged the legality of his detention on two grounds:

1) that the various allegations of facts were stale and remote in point of time in relation to the date of the making of the original detention order as the alleged activities took place between the end of 1981 to September 1983 whilst that detention order was only made on 2 April 1986; and
2) that in making the extension order the Minister applied his mind to prejudicial material not only in the case file but also in the report of the advisory board which was contrary to s 11(4) of the Dangerous Drugs (Special Preventive Measures) Act 1985.

In my view the question of staleness or remoteness forming the first ground of challenge goes to the question of

sufficiency or relevancy of the facts, an enquiry upon which the court cannot embark as it is based on the subjective satisfaction of the Minister who in making the first order of detention in the interest of public order under s 5(1) of the Act, can take into account the applicant's past association 'with any activity in relation to or involving the trafficking in dangerous drugs' (See *Ee Kim Huan* v *Inspector-General of Police & Ors* in Seremban Criminal Application No 44/(54)-59-88).

As to the second ground, it is clear that the Minister extended the original extension under s 11A(1)(a)(aa) on the *same grounds* he acted on for the first detention order which was made under s 6(1) of the Act. The affidavit of Abdul Rahim bin Hashim (who was the assistant secretary at the Ministry of Home Affairs at the material time (see encl 14) shows that in coming to his decision to detain the applicant for a further period of two years on the same grounds, the Minister acted on the report of the advisory board and the applicant's case file containing a recommendation that a further order of detention under s 11A be made against the applicant. The chairman of the advisory board in his affidavit (see encl 12) deposed that the advisory board in its report to the Minister had expressed its opinion that the detention of the applicant 'be extended for a further period of two years on the same grounds as those on which the applicant's detention order was originally made.' It was the basic contention of counsel for the applicant that the Minister in considering the report of the advisory board recommending detention for another two years had in fact taken into account prejudicial material in contravention of sub-s (4) of s 11 because after the coming into operation of Act A629 of 1985 on 19 December 1985 the advisory board was only allowed upon review of the applicant's case either to recommend the cessation or to recommend the continuance of the detention order for the duration of the detention order under review and was not entitled to recommend the extension of that order (which it could do before the amendment). Section 11A which specifically empowers the Minister to extend a detention order however does not provide the basis upon which the Minister is required to act before deciding to extend the first detention order but the Minister purported to act on the reports and information relating to the applicant's conduct and activities represented by the applicant's case file and the report of the advisory board. As the recommendation of the advisory board to extend the first detention order was made ultra vires the provisions of s 11(4), the Minister in taking into account the report was in fact acting in a manner prejudicial to the applicant as the advisory board's report must by its very nature have been very persuasive in affecting the decision of the Minister. It is trite law that in the examination of cases relating to persons without trial the court has no discretion but to grant the subject the writ of habeas corpus where he has been unlawfully detained and counsel in seeking to show unlawful detention is fully entitled to seek the subject's release on the ground that statutory provisions have not been complied with. In the case of *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108, Lee Hun Hoe CJ (Borneo) had this to say at p 113:

> Further, preventive detention is a very serious invasion of personal liberty. Certain safeguards are provided by law for the protection of the subject and must be followed scrupulously. Where statutory requirements have to be complied with there must be strict compliance since it affects matters of such fundamental importance as the liberty of the subject. In *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184, Rigby J said to the effect that where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. Where the detention is not in accordance with law such detention is bad and the person is entitled to be released forthwith. The executive may decide to arrest him on his release and the process starts all over again. The court is not concerned with such matters at this stage. The function of the court is to interpret the law in accordance with established principles of construction.

Although it is clear on the authorities that the court is precluded from adjudicating on the sufficiency of the satisfaction of the Minister it can however examine whether the detention falls within the scope of the law under consideration. The Minister purported to act pursuant to the powers conferred under s 6(5)(a) which relates to his subjective satisfaction being based on the complete report of investigation submitted under sub-s (3) of s 3 and on the report of the inquiry officer submitted under sub-s (4) of s 5 and when the Minister considered the report of the advisory board which contained a specific recommendation for the further detention of the applicant, he had in fact taken into account extraneous material which the law did not contemplate he should consider and he had, in my view, purported to exercise powers beyond the ambit of s 6(1). As there was no strict compliance with the provisions of the law affecting the personal liberty, it was my judgment that the applicant was entitled to be granted his application and I accordingly ordered that the writ of habeas corpus be issued for him to be set free.

Application allowed.

Solicitors: *Abdul Raman Saad & Associates.*

Reported by *Yap Shao Sin*